Editor's note: 78 I.D. 305

ALFRED E. KOENIG

IBLA 71-205 Decided October 26, 1971

Public Lands: Special Use Permits -- Rights-of-Way: Generally

A special land use permit will not be granted where other provisions of any existing law authorize the desired use; therefore, it is proper to reject an application for a special land use permit to accommodate an access road to a mining claim where the road is authorized by existing law.

Mining Claims: Generally -- Rights-of-Way: Generally

The United States mining laws give to the owner of mining claims as a necessary incident a non-exclusive right of access across the public lands to their claims for purposes of maintaining the claims and as a means of removing the minerals. Therefore, an owner of a mining claim may construct and maintain across the public lands a non-exclusive road for such purposes.

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IBLA 71-205 : C-9239

: Special land use permit
: application rejected

: Affirmed as modified

DECISION

Alfred E. Koenig has appealed from a decision dated November 25, 1970, in which the district manager, Glenwood Springs District, Bureau of Land Management, rejected his application C-9239 for a special land use permit to accommodate an access road right-of-way across public domain lands for a distance of approximately 1,082 feet.

The district manager refused to encumber the land with the special land use permit on the basis that the land is included in a state indemnity selection application by the State of Colorado, on which favorable action was contemplated by the Bureau.

The appellant contends that the road has been built and is necessary for access to his mine workings. He further asserts that the road affords the only access to his mining claim. The existence of the road is confirmed by a letter of January 15, 1971, from the acting district manager to the appellant. The need for the road is unrebutted in the record.

The threshold question is whether the appellant needs any authorization from the Bureau of Land Management to construct and maintain such an access road on the public lands. For the reasons indicated below, if the road is not exclusive of the general public, no such authorization is required.

In Solicitor's Opinion, 1/ M-36584, 66 I.D. 361 (1959), the question is resolved as follows:

> The genesis and history of the mining laws make it clear that Congress intended to give the miner free access to minerals in the public lands

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1/ Cited with approval in United States v. 9,947.71 Acres of Land, etc., 220 F. Supp. 328, 332 (D.C. Nev. 1963).

and to leave him free to mine and remove them without charge. Congress in the 1860's failed to go along with an executive recommendation for disposing of the minerals by lease in order to raise revenue. It has consistently since then left the miner free and untrammeled so far as his mineral rights are concerned. . . . Further, Congress, in effect, confirmed the miner's rights previously exercised under sufferance as much as it granted mining rights. . . .

Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of the boundaries of their claims for the running of tunnels and for roads. In effect, it provided only for a procedure where possession could be maintained and patent to the land could be obtained. Otherwise the clear intent was that the miner should have the right to appropriate the minerals and convey them to market. Lindley in his 3d edition on Mines, volume 2, sections 629 and 631, points out that roadways are necessary as an adjunct to working a claim and as a means toward removing the minerals.

The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. Emily Lode, 6 L.D. 220 (1887). In Douglas and Other Lodes, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in Tacoma and Roche Harbor Lime Co., 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied to an aerial tramway in United States v. El Portal Mining Co., 55 I.D. 348 (1935), citing the Tacoma case, supra. These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in

> that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.
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> We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, supra, [43 U.S.C. § 956 (1970)] the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.
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> 66 I.D. 363-365.

In view of the foregoing, it is clear that no authorization is needed for such a non-exclusive road. 2/ The record indicates that appellant desires merely a non-exclusive road. Accordingly, appellant's continued use of the access road is authorized by law. In that posture, this decision is dispositive of the case.

2/ We note that the State Board of Land Commissioners, by letter of May 14, 1970, stated that "we have no objection to the granting of a right-of-way for a public road over this lot. . . ." The Boulder County Engineering Department, by letter of May 18, 1970, asked that the district manager "reconsider the granting of any access strips or lands that might be used for improper land development purposes without first requiring adherence to local planning requirements." In view of our holding, there is no discretion in the Department concerning this matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed as modified.

Frederick Fishman, Member

We concur:

Newton Frishberg, Chairman

Francis E. Mayhue, Member.